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IN THE

Supreme Court of the United States

October Term, 1978.

No. 79-343

SUN SHIPBUILDING & DRY DOCK COMPANY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD, JOHN APRIL, CURTIS L. FIELDS, FRANK JANUZCIEWICZ, JOSEPH C. KIMMEL and WILLIE MOORE,
Appellees.

On Appeal From the Commonwealth Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

JEFFERY C. HAYES,
2001 The Fidelity Building,
123 South Broad Street,
Philadelphia, PA 19109
Counsel for Appellant, Sun Shipbuilding & Dry Dock Company.

Of Counsel:
THOMAS E. ZEMAITIS,
PEPPER, HAMILTON & SCHEETZ,
2001 The Fidelity Building,
123 South Broad Street,
Philadelphia, PA 19109

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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Appellees.

ON APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT.

Appellant Sun Shipbuilding & Dry Dock Company ("Sun Ship") appeals from the final judgment of the Commonwealth Court of Pennsylvania in five consolidated actions, dated March 16, 1979, holding that application of the Pennsylvania Workmen's Compensation Act to permit the exercise of jurisdiction and the award of benefits thereunder for claims falling within the coverage of the Longshoremen's and Harbor Workers' Compensation Act is not repugnant to the Supremacy Clause of the United States Constitution or the exclusive federal admiralty jurisdiction.

OPINIONS BELOW.

The opinion and order of the Commonwealth Court of Pennsylvania is reported at 398 A. 2d 1111 (1979). No official report has been published to date and a copy of the opinion and order is reprinted in the appendix hereto, pp. A1-A10.

The opinions of the workmen's compensation referees and the Pennsylvania Workmen's Compensation Appeal Board in each of the five cases which were consolidated before the Pennsylvania Commonwealth Court are not reported. These opinions are reprinted in the appendix hereto, pp. A18-A72.

JURISDICTION.

This proceeding involves claims for benefits made pursuant to the Pennsylvania Workmen's Compensation Act ("Pennsylvania Act"). Act of June 2, 1915, Pub. L. 736, No. 338, *as amended*. Pa. Stat. Ann. tit. 77, § 1 *et seq.* (Purdon). In accordance with the provisions of the Pennsylvania Act, each case before this Court was initially heard by a referee whose decision was appealed to the Pennsylvania Workmen's Compensation Appeal Board. Petitions to review the Board's decisions were filed by Sun Ship with the Commonwealth Court of Pennsylvania. The judgment of the Commonwealth Court affirming the decisions of the Workmen's Compensation Appeal Board and awarding benefits to the individual appellees was entered on March 16, 1979. Sun Ship petitioned the Supreme Court of Pennsylvania for allowance of appeal in each of the five cases decided by the Commonwealth Court, but these petitions were denied by orders dated June 4, 1979. (Appendix, pp. A11-A15.)

A notice of appeal to this Court was duly filed with the Commonwealth Court of Pennsylvania on July 19, 1979. (Appendix, pp. A16-A17.) This appeal is being docketed in this Court within 90 days from the orders denying Sun Ship's petitions for allowance of appeal below. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2).

In this appeal, Sun Ship challenges the ruling below that the Pennsylvania Act is not repugnant to the Constitution and laws of the United States when applied to a claim for compensation benefits for an injury occurring on the navigable waters of the United States as defined in Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act ("Longshoremen's Act"), Act of March 4, 1927, ch. 509, 44 Stat. 1426, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251. 33 U. S. C. § 903(a). This Court's appellate jurisdiction is sustained by the decisions in *Huron Portland Cement Co. v. City of Detroit*, 362 U. S. 440 (1960) (appeal from Michigan courts of judgment sustaining validity of local smoke abatement code as applied to ships in interstate commerce); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921) (writ of error to Kentucky courts to review judgment sustaining validity of state statute requiring registration to do business as applied to foreign corporation); and *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917) (writ of error to New York courts to review judgment sustaining validity of state workers' compensation law as applied to injury occurring over navigable waters of the United States).

QUESTION PRESENTED.

Whether the Pennsylvania Workmen's Compensation Act is repugnant to the Supremacy Clause or the Admiralty Clause of the United States Constitution when the Pennsylvania Act is applied to permit the exercise of jurisdiction and the award of benefits thereunder for a claim resulting

from an injury to a maritime employee which falls within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

1. United States Constitution, Art. III, § 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. United States Constitution, Art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Section 3, Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1426, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251. 33 U. S. C. § 903:

COVERAGE

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—

> (1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or
>
> (2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

4. Section 5(a), Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1426, *as amended by* Pub. L. No. 92-576, 86 Stat. 1251. 33 U. S. C. § 905(a):

EXCLUSIVENESS OF LIABILITY

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, de-

pendents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

5. Section 101, Pennsylvania Workmen's Compensation Act, Act of June 2, 1915, Pub. L. 736, No. 338, *as amended.* Pa. Stat. Ann. Tit. 77, § 1 (Purdon):

SHORT TITLE; APPLICATION OF ACT

That this act shall be called and cited as The Pennsylvania Workmen's Compensation Act, and shall apply to all injuries occurring wthin this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended, and extraterritorially as provided by section 305.2.

RAISING THE FEDERAL QUESTION.

Sun Ship's contention that the Pennsylvania Act is constitutionally invalid as applied to the five claims at issue was raised at the earliest possible opportunity in Sun Ship's answers to the claim petitions wherein it alleged that no jurisdiction exists under the Pennsylvania Act because each

of these claims is cognizable only under the Longshoremen's Act. In four of the five cases at issue the referee rejected Sun Ship's contention that federal jurisdiction is exclusive, and Sun Ship challenged these holdings as erroneous in its appeals to the Pennsylvania Workmen's Compensation Appeal Board. In the fifth case (*Curtis L. Fields*) the referee sustained Sun Ship's jurisdictional argument and an appeal to the Board was taken by the claimant.

While specifically noting Sun Ship's contention that the exercise of state jurisdiction is unconstitutional, the Board concluded that jurisdiction to award compensation benefits in these cases is concurrent under the PWCA and the Longshoremen's Act. In Sun Ship's petitions for review of the Board's decisions filed with the Commonwealth Court of Pennsylvania it once again challenged this conclusion stating: "The Referee lacks jurisdiction of the claim because the claim falls within the exclusive jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act." The Commonwealth Court considered, but rejected, Sun Ship's constitutional attack on the validity of the exercise of jurisdiction over these cases by Pennsylvania. Sun Ship again raised the constitutional issue before the Supreme Court of Pennsylvania in its petitions for allowance of appeal, but that Court declined to exercise its discretionary appellate jurisdiction over these cases.

STATEMENT OF THE CASE.

Each of the five cases before this Court involves a claim brought pursuant to the Pennsylvania Act for an alleged disfigurement resulting from an injury sustained by one of the individual appellees (collectively referred to as "claimants") while employed by Sun Ship, a company engaged in shipbuilding and ship repair. In each case the injuries occurred after November 26, 1972, the effective date of the 1972 amendments to the Longshoremen's Act.

Pub. L. No. 92-576, 86 Stat. 1251. All of the injuries occurred at Sun Ship's yard which is located in Chester, Pennsylvania, and which borders upon the Delaware River, a navigable water of the United States. The injuries sustained by claimants Fields and April occurred while performing repair functions on ships located in dry dock at Sun Ship's yard.

In each of the five cases the referee to whom the claim was assigned initially heard testimony and concluded that the Longshoremen's Act was applicable to the claim. As a result of this conclusion, the referee in the *Fields* case held that the claim under the Pennsylvania Act must be dismissed because the 1972 amendments to the Longshoremen's Act preempted state compensation acts with respect to maritime employees. (Appendix, pp. A58-A60.) The referee who heard the other four cases, however, concluded that, despite the applicability of the Longshoremen's Act, benefits could be awarded under the Pennsylvania Act because federal and state jurisdiction are concurrent. (Appendix, pp. A54-A57, A61-A72.)

When these cases came before the Workmen's Compensation Appeal Board, on appeal by the claimant in *Fields* and on appeal by Sun Ship in the other cases, the issue of exclusive federal jurisdiction was raised and the cases were briefed by the parties and consolidated for purposes of argument on this issue. Each of the Board's opinions are identical with respect to the jurisdictional issue. (Appendix, pp. A18-A53.) The opinions note that the parties have never disputed the coverage of the Longshoremen's Act, and the Board concluded, as did the referees, that the federal statute unquestionably applies. Nevertheless, the Board held that jurisdiction under the Pennsylvania Act exists because federal jurisdiction in this area is not exclusive, despite the 1972 amendments to the Longshoremen's Act which greatly expanded that Act's

coverage by redefining navigable waters of the United States to include areas landward of the water's edge.

A panel of three judges of the Commonwealth Court of Pennsylvania, in which court petitions to review the Board's decisions were lodged, received briefs and heard argument on the five cases, which had previously been consolidated for disposition. While additional issues concerning the interpretation of the substantive provisions of the Pennsylvania Act were raised before that court, the principal focus was on Sun Ship's constitutional challenge to the applicability of the Pennsylvania Act. In its opinion of March 16, 1979 the court did not question the applicability of the Longshoremen's Act to these claims. To the contrary, it proceeded to address Sun Ship's argument that the exercise of jurisdiction under the Pennsylvania Act is unconstitutional in circumstances where the Longshoremen's Act does apply. (Appendix, pp. A1-A10.)

The Commonwealth Court rejected Sun Ship's argument, however. While recognizing that the Supremacy Clause of the United States Constitution precludes states from enforcing their statutes when Congress has preempted a particular field, the court concluded that the language and the legislative history of the 1972 amendments to the Longshoremen's Act did not indicate a congressional intent to preempt state workmen's compensation laws for maritime workers within the coverage of the Longshoremen's Act. The Supreme Court of Pennsylvania denied Sun Ship's petitions for allowance of appeal from this decision on June 4, 1979, rendering it a final judgment for purposes of appeal to this Court as of that date. (Appendix, pp. A11-A15.) Because the administrative bodies and the courts of Pennsylvania have erroneously concluded that the 1972 amendments to the Longshoremen's Act do not provide for exclusive federal jurisdiction over claims

otherwise falling under that Act and that application of the Pennsylvania Act in these cases is not repugnant to the Constitution of the United States, Sun Ship has taken this appeal to this Court.

THE QUESTION IS SUBSTANTIAL.

This appeal presents an important question not previously considered by this Court regarding the constitutional limitations on the authority not only of Pennsylvania but of every state to enforce workers' compensation statutes of general applicability to maritime injuries which are now within the coverage of the Longshoremen's Act as expanded by Congress in 1972. Moreover, because the injuries of two of these claimants occurred during the performance of ship repairs on vessels in dry dock, an area expressly covered under the Longshoremen's Act even before 1972, important issues are raised regarding the constitutionality of attempts by the states to encroach upon an area long recognized as being within the exclusive federal admiralty jurisdiction. Both of these questions are critical to the administration of the Longshoremen's Act as amended by Congress in 1972.

The interface between federal and state jurisdiction to provide benefits to injured maritime workers has occupied this Court's attention on numerous occasions since the decision in *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917). There it was held that the application of New York's compensation statute to an injury occurring to a stevedore unloading a ship on the navigable waters of the United States would destroy the national uniformity with regard to maritime matters which the Admiralty Clause of the Constitution, Art. III, § 2, and the congressional grant of exclusive admiralty jurisdiction to federal courts were designed to establish.

Indeed, this decision and subsequent cases relying on it provided the impetus for passage of the original Longshoremen's Act in 1927 to fill the void in workers' compensation for workers injured over the navigable waters and in the area of exclusive federal jurisdiction. Consistent with this gap-filling purpose, the Act's coverage was originally limited to "injuries occurring upon the navigable waters of the United States (including any dry dock)" but only when "recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Act of March 4, 1927, ch. 509, § 3, 44 Stat. 1426. Thus, in 1927 Congress defined the scope of the Act's coverage by using the term which was used by the courts to define the area of exclusive federal admiralty jurisdiction ("navigable waters of the United States"), *e.g., State Industrial Comm'n v. Nordenholt Corp.*, 259 U. S. 263, 271 (1922); *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 59-60 (1914), but left it to the courts to determine the meaning of that phrase as well as those instances where state jurisdiction might be exercised.

Unfortunately, the courts were unable to draw the theoretically precise line at which federal and state jurisdiction met under the original Longshoremen's Act, due in large part to exceptions engrafted upon the *Jensen* rule prior to the initial enactment of the Longshoremen's Act. The purpose of these exceptions was to ameliorate the perceived harshness of the *Jensen* rule which deprived workers whose injuries occurred over the navigable waters of any compensation coverage. *E.g., Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469 (1922) (state compensation award constitutional when injury occurred over the navigable waters, but where activity was of purely local interest).

This Court has grappled with the difficulties resulting from Congress's adoption of the *Jensen* line in numerous

cases spanning 45 years, finally concluding that it would not disturb the exercise of state jurisdiction over an injury occurring over the navigable waters if the injury fit within a recognized exception to the *Jensen* rule, *Davis v. Washington Department of Labor and Industries*, 317 U. S. 249 (1942), but that the Longshoremen's Act would furnish a remedy for all injuries occurring on the navigable waters. *Calbeck v. Travelers Insurance Co.*, 370 U. S. 114 (1962). The Court made plain, however, that federal coverage stopped at the water's edge and that any expansion of that coverage or of the admiralty jurisdiction over maritime injuries would have to come from Congress. *Nacirema Operating Co. v. Johnson*, 396 U. S. 212, 223-24 (1969); *see Victory Carriers, Inc. v. Law*, 404 U. S. 202, 211 (1971).

In 1972 Congress responded by completely overhauling the Longshoremen's Act to remedy many problems in the Act's administration and to provide a comprehensive federal system of adequate compensation for all maritime workers. Whether viewed in terms of a congressional extension of the federal admiralty jurisdiction or as an act of supreme federal legislative authority, both the language of the 1972 amendments and their legislative history manifest the congressional intent that federal jurisdiction be exclusive over injuries within the Act's coverage, thereby constitutionally precluding the states from applying state compensation statutes to such cases.

In the 1972 amendments, Congress eliminated the "if recovery . . . may not validly be provided by State law" language of Section 3(a), changing the Longshoremen's Act from a "gapfiller" to an affirmative exercise of federal jurisdiction. *See Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249, 256-65 (1977). At the same time, Congress redefined "navigable waters of the United States"

to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U. S. C. § 903(a).[1] These two language changes alone are strong evidence that Congress intended exclusive federal jurisdiction for claims falling within the expanded coverage of the Act.

This Court's decision in *Victory Carriers, Inc. v. Law*, 404 U. S. 202, 205 (1971), reflects that the phrase "navigable waters of the United States" has long been used to define the scope of maritime tort jurisdiction and, consequently, that of exclusive federal admiralty jurisdiction. That decision, coming less than one year before the 1972 amendments to the Longshoremen's Act, also recognizes the ultimate authority of Congress to determine the scope of the federal admiralty jurisdiction. *Id.* at 211, 214, 215-216.

Had Congress merely intended to expand federal coverage to shoreside injuries without preempting state jurisdiction, it could have framed the amendment to Section 3(a) to cover accidents occurring on the navigable waters plus accidents on the land in the defined area. Instead Congress chose to redefine the phrase "navigable waters."

1. At the same time Congress explicitly defined the term "employee" to include "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker. . . ." 33 U. S. C. § 902(3). In *Northeast Marine Terminal Co. v. Caputo*, 432 U. S. 249 (1977), this Court recognized that the expansion of "navigable waters" to include shoreward areas necessitated an affirmative description of the class of workers covered. This definition is expansive, but it also insures the nexus between the maritime jurisdiction and the injury by creating both a situs and a status test for coverage. Thus, the definition further indicates Congress's intention to exercise its legislative jurisdiction in admiralty to the exclusion of state law. *See, Sea-Land Service, Inc. v. Director*, 540 F. 2d 629, 638 (3d Cir. 1976).

Obviously, none of the newly covered land areas are navigable waters in fact. Thus, Congress was not using this term to describe the physical attributes of the area within the Longshoremen's Act's coverage. To the contrary, "navigable waters of the United States" is used as a term of art to express the congressional intent that these areas are now within the federal admiralty jurisdiction.

The exclusivity of federal jurisdiction is also supported by the language of Section 5(a) of the Act, 33 U. S. C. § 905(a) which provides in pertinent part:

> The liability of an employer prescribed in section 904 of this title *shall be exclusive and in place of all other liability* of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . . (emphasis supplied).

While this language was part of the Longshoremen's Act prior to the 1972 amendments, it did not bear on the question of the applicability of state law since, by the unamended Act's terms, no federal remedy was provided thereunder if state law could provide a remedy. When Congress extended federal jurisdiction into areas formerly under state jurisdiction it did not amend this language. No amendment was required, however, because this provision already comported with the intent to create a system of exclusive federal coverage. Thus, the scope of the exclusivity merely expanded along with the expansion of the geographical coverage of the amended Act.

As noted above, the *Jensen* decision reflected the conclusion that, with respect to compensation for maritime

workers injured on the navigable waters, state law must yield to the needs of a uniform federal maritime law. The 1972 amendments reflect Congress's conclusion that this need for uniformity continues, but that to achieve true uniformity for injuries to maritime employees, the geographical reach of the maritime law must extend beyond the water's edge to the adjoining land areas. This is plain from the legislative history to the 1972 amendments:

> The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.
>
> * * *
>
> It is apparent that if the Federal benefit structure embodied in the Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, *if State laws are permitted to continue to apply to injuries occurring on land. . . .*
>
> *The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water.* Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other

> employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.
>
> *The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity.*

H. R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Ad. News 4698, 4707-08 (emphasis supplied).

As this quotation amply demonstrates, Congress was very concerned with the inadequacy of benefits and the disparity in treatment accorded maritime workers, not only between federal and state coverage, but also among the coverages of the various states resulting from the wholly fortuitous factor of where the accident occurred. Thus, Congress sought to achieve two important goals when it enacted the 1972 amendments: adequacy of benefits and uniformity of coverage. Fully attaining these goals is possible only if federal coverage is exclusive for claims falling thereunder. By holding that jurisdiction under the Pennsylvania Act and the Longshoremen's Act is concurrent for these claims, however, the Pennsylvania courts have precluded the achievement of these express goals. Because this holding conflicts with the manifest intent of Congress to preempt state workers' compensation statutes for injuries to maritime employees, it runs afoul of the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and

numerous decisions of this Court applying the preemption doctrine.

The determination of whether a federal statute preempts state law in a particular area is essentially a search for the intent of Congress. This process was summarized in *Ray v. Atlantic Richfield Co.*, 435 U. S. 151, 157-58 (1978):

> The Court's prior cases indicate that when a State's exercise of its police power is challenged under the Supremacy Clause, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U. S. 519, 525 (1977). Under the relevant cases, one of the legitimate inquiries is whether Congress has either explicitly or implicitly declared that the States are prohibited from regulating the various aspects of oil-tanker operations and design with which the Tanker Law is concerned. As the Court noted in *Rice, supra,* at 230:
>
> > "[The congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n,* 250 U. S. 566, 569; *Cloverleaf Butter Co. v. Patterson,* 315 U. S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz,* 312 U. S. 52. Likewise, the object sought to be obtained by the federal law and the

> character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission,* 236 U. S. 439; *Charleston & W. C. R. Co. v. Varnville Co.,* 237 U. S. 597; *New York Central R. Co. v. Winfield,* 244 U. S. 147; *Napier v. Atlantic Coast Line R. Co., supra.*"

Accord, *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U. S. 624, 633 (1973).

Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . . ," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U. S. 132, 142-143 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U. S. 52, 67 (1941); *Jones v. Rath Packing Co., supra,* at 526, 540-541. Accord, *De Canas v. Bica,* 424 U. S. 351, 363 (1976).

Both the language and the legislative history of the 1972 amendments to the Longshoremen's Act strongly evidence a preemptive intent. Maritime activities have always been imbued with a dominant federal interest. The Longshoremen's Act now provides a pervasive system of compensation for all maritime workers, complete with procedural safeguards and a specialized adjudicatory body (the Benefits Review Board) to insure that the Act is liberally and uniformly construed, consistent with Congress's intent to provide adequate benefits for all maritime workers.

It is readily apparent that continued application of state law to claims falling within the expanded jurisdiction

of the Longshoremen's Act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U. S. 52, 67 (1941). A maritime worker claiming under a state compensation act would be subject to all the procedural and substantive limitations found therein, which may differ substantially from the Longshoremen's Act. Certain provisions of the state act may appear more beneficial, thereby prompting the institution of a state claim, but other, less apparent provisions may operate to limit coverage under the state act to the detriment of the claimant.[2] Congress passed the 1972 amendments specifically to eliminate the disparities which arose from application of various state laws (each responsive to the interests of nonmaritime workers and employers in the particular state) to maritime workers whose interests Congress believed could only be adequately protected by a uniformly applicable federal compensation system.

During that period when the Longshoremen's Act did not apply to any injury occurring to a maritime worker on land, the states had a strong interest in protecting such workers through their general compensation statutes, in the same manner all other workers in the state were protected. After 1972, however, the states' interest in seeing that benefits are provided these workers is fully satisfied by application of the Longshoremen's Act. Thus, against the strong federal interest in adequacy and uniformity embodied in the 1972 amendments, the only state interest

2. This possibility was cogently illustrated by Justice Keith of the Texas Court of Civil Appeals in his dissenting opinion in *Johnson v. Texas Employers Insurance Ass'n,* 558 S. W. 2d 47, 52-58 (1977), wherein he unsuccessfully attempted to determine a motive for a claimant's desire to recover under the Texas compensation statute, which limited benefits to $70 per week, rather than the Longshoremen's Act where the claimant's benefits would have been $318.38 per week.

which is arguably served by continued application of a state compensation statute is the interest in having the claim processed under the particular provisions of the state statute. Such parochial concerns must yield to the predominating federal interests, particularly in circumstances involving the admiralty and maritime jurisdiction where federal supremacy has long been the rule.[3]

In short, whether viewed as an extension of federal jurisdiction in admiralty or as an exercise of Congress's legislative authority to preempt existing state law, the 1972 amendments to the Longshoremen's Act operate to preclude Pennsylvania or any other state from exercising jurisdiction over a claim for compensation benefits by a maritime worker within the Act's coverage. There is no question that each of the five claims at issue are within the coverage of the Longshoremen's Act, and the tribunals below assumed such coverage existed in rendering their decisions. Nevertheless, in opinions which pay scant attention to the statutory language or legislative history of the 1972 amendments, these tribunals concluded that benefits could be awarded under the Pennsylvania Act, holding that neither the United States Constitution nor federal law precluded the exercise of state jurisdiction. It is the propriety of this decision which Sun Ship asks this Court to determine.

There are several reasons why plenary consideration of this appeal is necessary. These cases present a question of first impression not only in this Court, but also, to Sun Ship's knowledge, in any federal court. Since the interpretation of federal statutes is a matter of federal law, this is the first opportunity for an authoritative construction of

3. *See, by contrast, Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U. S. 132, 144 (1963) ("[T]he maturity of avocados is a subject matter of the kind this Court has traditionally regarded as properly within the scope of state superintendance.").

the jurisdictional provisions of the 1972 amendments to the Longshoremen's Act as they relate to state law and the intent of Congress in enacting those provisions.

Moreover, the question of the jurisdictional interface between the amended Longshoremen's Act and state compensation statutes is national in scope and ripe for decision by this Court. Indeed, the courts of at least three states other than Pennsylvania have expressly decided this issue. *Poche v. Avondale Shipyards, Inc.,* 339 So. 2d 1212 (La. 1976), *appeal dismissed for want of jurisdiction sub nom. Territo v. Poche,* 434 U. S. 803 (1977);[4] *Murray v. City of Augusta,* 394 A. 2d 1171 (Me. 1978); and *Johnson v. Texas Employers Insurance Ass'n,* 558 S. W. 2d 47 (Tex. Ct. Civ. App. 1977). While each of these jurisdictions ultimately rejected the employers' contention that federal jurisdiction was exclusive, the issue was hardly free from doubt as the vigorous dissent of Justice Keith in *Johnson,* concluding federal jurisdiction is exclusive, demonstrates.

Furthermore, in *White v. Norfolk & Western Ry. Co.,* 217 Va. 823, 232 S. E. 2d 807, *cert. denied,* 434 U. S. 860 (1977), the Supreme Court of Virginia relied upon Section 5 of the Longshoremen's Act, 33 U. S. C. § 905, to conclude that jurisdiction under the Act would be exclusive for the claim of a railroad employee otherwise covered by the Federal Employers' Liability Act ("FELA"), 45 U. S. C. §§ 51-60, though it held under the facts at issue that the employee did not meet the status test for Longshoremen's Act coverage. The FELA bears the same relationship to federal admiralty jurisdiction as state compensation acts. *See Southern Pacific Co. v. Jensen,* 244 U. S. 205 (1917) (holding no recovery permissible under

4. This Court's dismissal of the appeal in *Poche* resulted from the lack of a final judgment since the Louisiana Supreme Court had remanded the case for trial. Thus, the merits of the jurisdictional issue were not reached in that appeal.

either New York law or FELA for injury occurring over the navigable waters). The Virginia courts may well conclude, therefore, that jurisdiction under the Longshoremen's Act is exclusive for injuries covered thereby, precluding recovery under the Virginia compensation statute. It is important that this uncertainty be resolved by this Court, given its ultimate authority to interpret federal statutes and to decide federal constitutional issues.

An additional reason for plenary consideration is presented by the Pennsylvania Commonwealth Court's disposition of the claims of John April and Curtis L. Fields. As stated above, the injuries to both of these claimants occurred while they were engaged in repairs to ships located in dry docks at Sun Ship's yard. Dry docks have always been considered part of the navigable waters of the United States, and this construction was confirmed by Congress in 1927 when it defined navigable waters in Section 3(a) of the original Longshoremen's Act to include "any dry dock."

After the passage of the original Longshoremen's Act both state and federal appellate courts continued to recognize that the making of repairs to a ship while in the water or in dry dock is a maritime activity on the navigable waters of the United States which falls within the area of exclusive federal jurisdiction. *E.g., Flowers v. Travelers Insurance Co.*, 258 F. 2d 220 (5th Cir. 1958), *cert. denied*, 359 U. S. 920 (1959); *Atlas Iron and Metal Co. v. Hesser*, 177 So. 2d 199 (Fla. 1965); *Warner v. Travelers Insurance Co.*, 332 S. W. 2d 789 (Tex. Civ. App. 1960); *see Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F. 2d 968 (4th Cir. 1951) (repairs made to dry dock held to constitute maritime activity within exclusive federal jurisdiction). In each of these cases the courts rejected state workers' compensation jurisdiction, even when it required dismissal of the claim.

The decision of the Commonwealth Court in *April* and *Fields* directly conflicts with these cases by holding that the Pennsylvania Act can furnish a basis for recovery for injuries occurring in dry dock. In effect, the Pennsylvania court has concluded that, beyond not intending to preempt state compensation laws for injuries to maritime workers occurring on land in 1972, Congress was also sanctioning an expansion of state jurisdiction over areas previously under exclusive federal jurisdiction as a matter of constitutional law by virtue of *Jensen* and its progeny. This wholly unwarranted conclusion is at odds with the express intent of Congress to expand federal jurisdiction to provide an adequate and uniform compensation system for maritime workers as well as with the fundamental need for national uniformity in maritime matters as expressed in *Jensen*.

Indeed, courts outside Pennsylvania have concluded that, whatever the effect of the 1972 amendments on the relationship between state and federal jurisdiction for maritime injuries on the land, federal admiralty jurisdiction remains exclusive over those areas where it was exclusive prior to 1972. *Wixom v. Travelers Insurance Co.*, 357 So. 2d 1343 (La. Ct. App. 1978) (exclusive jurisdiction under Longshoremen's Act for injuries occurring during repair of ship in navigable waters); *see Fusco v. Perini North River Assoc.*, Nos. 79-4006, 79-4015, 79-4016 (2d Cir., June 29, 1979) (if status test for coverage under Longshoremen's Act is read narrowly to preclude recovery thereunder for injuries occurring on navigable waters where employment is not "maritime," some workers on navigable waters would be left without any compensation remedy, state or federal). Thus, the Commonwealth Court has seriously misinterpreted the effect of the 1972 amendments to the Longshoremen's Act, resulting in an

unconstitutional expansion of jurisdiction under the Pennsylvania Act into areas long recognized as within exclusive federal admiralty jurisdiction.

In conclusion, the Pennsylvania Commonwealth Court has misconstrued the intent of Congress in enacting the 1972 amendments to the Longshoremen's Act. As a result, it has held that application of the Pennsylvania Act to afford compensation benefits to maritime workers within the coverage of the Longshoremen's Act is not repugnant to the United States Constitution or to the exclusive federal admiralty jurisdiction. This action plainly falls within the appeal jurisdiction of this Court under 28 U. S. C. § 1257(2), and the disposition of this important question of the proper relationship between federal and state law necessitates plenary consideration.

CONCLUSION.

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

JEFFERY C. HAYES,
2001 The Fidelity Building,
123 South Broad Street,
Philadelphia, PA 19109
Counsel for Appellant,
Sun Shipbuilding & Dry Dock Company.

Of Counsel:

THOMAS E. ZEMAITIS,
PEPPER, HAMILTON & SCHEETZ,
2001 The Fidelity Building,
123 South Broad Street,
Philadelphia, PA 19109

Appendix.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

No. 31 C. D. 1978

SUN SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD AND FRANK JANUZCIEWICZ,
Respondents.

No. 32 C. D. 1978

SUN SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD AND CURTIS L. FIELDS,
Respondents.

No. 33 C. D. 1978

SUN SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD AND JOSEPH C. KIMMEL,
Respondents.

No. 34 C. D. 1978

SUN SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD AND WILLIE MOORE,
Respondents.

No. 35 C. D. 1978

SUN SHIPBUILDING AND DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD AND JOHN APRIL,
Respondents.

Before: HONORABLE ROY WILKINSON, JR., *Judge*
HONORABLE GLENN E. MENCER, *Judge*
HONORABLE DAVID W. CRAIG, *Judge*

ARGUED: February 8, 1979

OPINION

OPINION BY JUDGE WILKINSON, JR.

Filed March 16, 1979

Each of the five cases which have been consolidated for appeal here involve awards of benefits by the Workmen's Compensation Appeal Board (Board) pursuant to The Pennsylvania Workmen's Compensation Act (Act) [1] for facial disfigurement resulting from five separate work-related injuries sustained by claimants while in the employ of Sun Shipbuilding and Dry Dock Company (petitioner), a company engaged in ship building and ship repair. We affirm.

The relevant findings of the referees regarding claimants' facial disfigurement are as follows: (1) a "residual scar about one-inch long over the left forehead extending into the eyebrow" (31 C. D. 1978); (2) a "one inch permanent scar above the left eyebrow" (32 C. D. 1978); (3) a "circular scar on the right cheek" (33 C. D. 1978); (4) a "residuum of a scar along the lower border of the right eye above the cheekbone approximately three-quarters of an inch long and visible from about fifteen feet" (34 C. D. 1978); and (5) "a residual oblique scar along the right side of the nose" (35 C. D. 1978). In each of the cases, the referee concluded that the claimant had suffered a serious and permanent facial disfigurement

1. Act of June 2, 1915, P. L. 736, *as amended,* 77 P. S. § 1 et seq.

within the purview of Section 306(c)(22) of the Act, 77 P. S. § 513(22). However, in 32 C. D. 1978 the referee found that claimant's remedy as a matter of law fell within the exclusive jurisdiction of federal compensation authorities pursuant to the Longshoremen's and Harbor Worker's Act [2] (hereinafter the Longshoremen's Act) and dismissed the claim petition.

Appeals were taken and consolidated for review by the Board. The decisions of the referee were upheld in all cases with respect to the factual findings of facial disfigurement and the determinations of compensability under the Act. Further, in 32 C. D. 1978 the Board held that the Longshoremen's Act did not confer exclusive jurisdiction in federal authorities.

Throughout the proceedings below, as here, the petitioner has maintained that Congress, by its 1972 amendments to the Longshoremen's Act, pre-empted the field of workmen's compensation for employees in maritime industries thereby ending the concurrent jurisdiction previously exercised by the state and federal governments. *See Calbeck v. Travelers Insurance Co.*, 370 U. S. 114, 82 S. Ct. 1196, 8 L. Ed 2d 368 (1962).

The original Longshoremen's Act was enacted by Congress in 1927. It contained two conditions of compensability, first that the injury occur on a navigable water and second that "[the] recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." [3] Thus, the 1927 Longshoremen's Act was intended only to be a gap-filler, that is, to fill the void created by the inability of states to remedy injuries occurring on navigable waters. *See*

2. 33 U. S. C. § 901 et seq.

3. Longshoremen's Act, ch. 509, § 3, 44 Stat. 1426 (1927) (current version at 33 U. S. C. § 903).

generally, Northeast Marine Terminal Co. v. Caputo, 432 U. S. 249, 97 S. Ct. 2348, 53 L. Ed. 2d 320 (1977).

The 1972 amendments to the Longshoremen's Act significantly broadened the activities of maritime workers which would be compensated under the federal scheme to include those on the landside of the water's edge and also eliminated the reference to state law in Section 903.[4] Petitioner argues that the extension of federal coverage to injuries sustained in landside activities and the elimination of the condition that recovery could be had only if "not validly provided by state law" evidence an intent by Congress to pre-empt the field of compensation for maritime workers.

It is clear that where Congress enacts a comprehensive statute which is intended to occupy the field, the Supremacy Clause of the United States Constitution requires that the states defer to the superior command of Congress. *Mamula v. United Steelworkers of America*, 409 Pa. 175, 185 A. 2d 595 (1962). Where Congress has legislated in a field that the states have traditionally occupied, the resolution of a pre-emption question begins "with the assumption that the . . . powers of the States were not meant to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Co.*, 331 U. S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947). Here, it is clear that except for the deletion of the language referring to state law, the 1972 amendments to the Longshoremen's Act do not expressly

4. The Longshoremen's Act currently provides:

"(a) Compensation shall be payable under this chapter in respect of disability or death . . . if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U. S. C. § 903(a).

preclude the exercise of state jurisdiction. Moreover, the legislative history of the amendments, contrary to petitioner's assertion, fails to point clearly to pre-emption. Rather, the purpose of the Act was declared to be two-fold: (1) to provide a "substantial increase in benefits to maritime workers so that benefits would more accurately track the workers' average wage" and (2) to extend the federal coverage "beyond the water's edge." *See Caputo, supra.*

Absent a clear expression by Congress, petitioner contends that an analysis of the statute shows an implied intent to preempt. The factors to be considered in determining whether pre-emption will be implied include: (1) the aim and intent of Congress; (2) the pervasiveness of the federal regulatory scheme; (3) whether the nature of the subject matter demands exclusive federal regulation to achieve national uniformity; and (4) whether state law poses an obstacle to the execution of the objective of the federal statute. *Santa Fe Elevator Corp., supra.* Petitioner's arguments with regard to these factors may be succinctly capsulized as follows: that by broadening coverage to include maritime workers' activities on land Congress created a pervasive federal regulatory scheme and that exclusive federal jurisdiction is necessary to achieve national uniformity in compensating maritime workers. However, it is clear that the extension of coverage of the Longshoremen's Act limited to land-based activities will not comprehensively cover all maritime activities covered on land; rather, courts must still determine the demarcation line of those areas "customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U. S. C. § 903(a). Thus, the federal scheme is not so pervasive as to cover the entire field of a maritime worker's activity. Similarly, the nature of the subject matter (compensation of injured workers arguably covered within the area of federal jurisdiction) does not demand national uniformity so as to require exclusive federal jurisdiction. Rather because state and federal jurisdiction must meet at some line near the water's edge the federal interest in providing some compensation to injured workmen would be more nearly served by continuing the concept of concurrent jurisdiction. *Accord,* G. Gilmore & C. Black, *The Law of Admiralty,* 425-26 (2d ed. 1975); 4 A. Larson, *Workmen's Compensation Law,* § 89.70 (1978); *see also Newport News Shipbuilding and Dry Dock Co. v. Director, Office of Workers' Compensation Programs,* 583 F. 2d 1273 (4th Cir. 1978) (where it was held that, under the 1972 amendments, the filing of a state claim did not preclude an award of benefits under the Longshoremen's Act).

Assuming, as we so hold, that the 1972 amendments to the Longshoremen's Act do not preclude the exercise of concurrent jurisdiction by the states, petitioner argues that there is insufficient competent evidence of permanent disfigurement in each of these cases because claimants failed to adduce medical evidence to establish the permanence of the scars. The record in each of these cases indicates that both the referees and the Board [5] observed the claimants' alleged disfigurements. However, the record fails to indicate that petitioner at any time during the hearings before the referees or the Board raised the issue of the permanence of the scars. We hold that scars of the type and nature presented here are *inter se* indicia of such permanence, that this issue of fact could be determined by the referee or Board on view, and that, unless the permanence of such a scar is put in issue, medical evidence need not be adduced to establish the permanence of the

5. As required by the rules of the Board. *See* 34 Pa. Code § 111.14.

disfigurement. Accordingly, petitioner's reliance on our decision in *Workmen's Compensation Appeal Board v. Pizzo,* 21 Cmwlth. 370, 346 A. 2d 588 (1976) where the permanence of the disfigurement was placed in issue at the referee's hearing, is misplaced.

Finally, we find no merit to petitioner's argument that the scars here were not as a matter of law as "serious" or of such a character to produce an unsightly appearance as required by Section 306(c)(22), 77 P. S. § 513(22). Such questions are issues of fact for the referee and the Board to determine upon a view of the claimants. *See Workmen's Compensation Appeal Board v. Jones & Laughlin Steel Corp.,* 25 Pa. Cmwlth. 542, 360 A. 2d 854 (1976).

Accordingly, we will enter the following

ORDER

AND NOW, March 16, 1979 , the orders of the Workmen's Compensation Appeal Board, dated December 8, 1977, at Nos. A-73219, A-73210, A-73220, A-73218 and A-73217, are hereby affirmed.

Further, it is ordered that judgment be entered in favor of the claimant, Frank Januzciewicz, and against the petitioner, Sun Shipbuilding and Dry Dock Company, self-insured, in the amount of $106.00 per week beginning January 30, 1974 and continuing thereafter for a period of five weeks, together with interest at the rate of 10 per cent per annum on all deferred amounts of compensation, with attorneys fees in the amount of $160.00 to be charged against the award, all in accordance with the provisions of The Pennsylvania Workmen's Compensation Act.

Further, it is ordered that judgment be entered in favor of the claimant, Curtis L. Fields, and against the petitioner, Sun Shipbuilding and Dry Dock Company, self-

insured, in the amount of $100.00 per week beginning May 2, 1973 and continuing thereafter for a period of 15 weeks, together with interest at the rate of 10 per cent per annum on all deferred amounts of compensation with attorneys fees equal to 20 per cent of the total charged against the award, all in accordance with the provisions of The Pennsylvania Workmen's Compensation Act.

Further, it is ordered that judgment be entered in favor of the claimant, Joseph C. Kimmel, and against the petitioner Sun Shipbuilding and Dry Dock Company, self-insured, in the amount of $114.00 per week beginning June 2, 1975 and continuing thereafter up to but not including July 1, 1975 and in the amount of $171.00 per week beginning July 1, 1975 and continuing thereafter up to but not including July 27, 1975, together with interest at the rate of 10 per cent per annum on all deferred amounts of compensation, with attorney's fees in the amount of $235.00 to be charged against the award, all in accordance with the provisions of The Pennsylvania Workmen's Compensation Act.

Further, it is ordered that judgment be entered in favor of the claimant, Willie Moore, and against the petitioner, Sun Shipbuilding and Dry Dock Company, self-insured, in the amount of $100.00 per week beginning May 13, 1973 and continuing thereafter for a period of eight weeks, together with interest at the rate of 10 per cent per annum on all deferred amounts of compensation, with attorney's fees in the amount of $160.00 to be charged against the award, all in accordance with the provisions of The Pennsylvania Workmen's Compensation Act.

Further, it is ordered that judgment be entered in favor of the claimant, John April, and against the petitioner, Sun Shipbuilding and Dry Dock Company, self-insured, in the amount of $114.00 per week beginning

January 8, 1975 and continuing thereafter for a period of five weeks, together with interest at the rate of 10 per cent per annum on all deferred amounts of compensation, with attorney's fees in the amount of $125.00 to be charged against the award, all in accordance with the provisions of The Pennsylvania Workmen's Compensation Act.

/s/ Roy Wilkinson, Jr.
Roy Wilkinson, Jr., *Judge*

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALLOCATUR DOCKET NO. 4264

SUN SHIPBUILDING & DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD and JOHN APRIL,

Respondents.

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED MARCH 16, 1979 IN NO. 35 C. D. 1978 AFFIRMING THE ORDER OF THE WORKMEN'S COMPENSATION APPEAL BOARD IN NO. A-73217

June 4, 1979. Petition Denied Per Curiam.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALLOCATUR DOCKET NO. 4263

SUN SHIPBUILDING & DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD and CURTIS L. FIELDS,
Respondents.

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED MARCH 16, 1979 IN NO. 32 C. D. 1978 AFFIRMING THE ORDER OF THE WORKMEN'S COMPENSATION APPEAL BOARD IN NO. A-73210

June 4, 1979. Petition Denied Per Curiam.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALLOCATUR DOCKET NO. 4259

SUN SHIPBUILDING & DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD and FRANK JANUZCIEWICZ,
Respondents.

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED MARCH 16, 1979 IN NO. 31 C. D. 1978 AFFIRMING THE ORDER OF THE WORKMEN'S COMPENSATION APPEAL BOARD IN NO. A-73219

June 4, 1979. Petition Denied Per Curiam.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALLOCATUR DOCKET NO. 4265

SUN SHIPBUILDING & DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD and JOSEPH C. KIMMEL,
Respondents.

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED MARCH 16, 1979 IN NO. 33 C. D. 1978 AFFIRMING THE ORDER OF THE WORKMEN'S COMPENSATION APPEAL BOARD IN NO. A-73220

June 4, 1979. Petition Denied Per Curiam.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALLOCATUR DOCKET NO. 4266

SUN SHIPBUILDING & DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD and WILLIE MOORE,
Respondents.

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED MARCH 16, 1979 IN NO. 34 C. D. 1978 AFFIRMING THE ORDER OF THE WORKMEN'S COMPENSATION APPEAL BOARD IN NO. A-73218

June 4, 1979. Petition Denied Per Curiam.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

SUN SHIPBUILDING & DRY DOCK COMPANY,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, WORKMEN'S COMPENSATION APPEAL BOARD
and
FRANK JANUZCIEWICZ,
Respondent in No. 31 C. D. 1978
CURTIS L. FIELDS,
Respondent in No. 32 C. D. 1978
JOSEPH C. KIMMEL,
Respondent in No. 33 C. D. 1978
WILLIE E. MOORE,
Respondent in No. 34 C. D. 1978
JOHN APRIL,
Respondent in No. 35 C. D. 1978

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Sun Shipbuilding and Dry Dock Company, the petitioner in the above-captioned consolidated actions, hereby appeals to the Supreme Court of the United States from the final judgment of the Commonwealth Court of Pennsylvania, affirming the orders of the Pennsylvania Workmen's Compensation Appeal Board, entered herein on March 16, 1979. The Pennsylvania Supreme Court denied Sun Shipbuilding and Dry Dock

Company's petitions for allowance of appeal from the Commonwealth Court's judgment on June 4, 1979.

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

JEFFERY C. HAYES
THOMAS E. ZEMAITIS
PEPPER, HAMILTON & SCHEETZ
2001 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109
(215) 893-3000

Attorneys for Petitioner
Sun Shipbuilding & Dry Dock Company

Filed: July 19, 1979

COMMONWEALTH OF PENNSYLVANIA
WORKMEN'S COMPENSATION APPEAL BOARD
HARRISBURG

A-73217

JOHN APRIL, Claimant
309 Donely Avenue
Aston, Pennsylvania 19014

v.

SUN SHIPBUILDING & DRY DOCK CO., Defendant
Chester, Pennsylvania 19013

Appeal by Defendant from Award of Referee Troilo
District No. 1, S.S. 195-05-9634

AFFIRMED

Claimant's Counsel:
Roland J. Artigues, Esquire
1737 Chestnut Street
Philadelphia, Pennsylvania 19103

Defendant's Counsel:
Andrew J. Forbes, Esquire
215 North Olive Street
Media, Pennsylvania 19063

OPINION

HERSKOVITZ, *Chairman*:

The Claimant in this proceeding is John April who claims compensation on account of disfigurement sustained January 8, 1975 while he was employed by Sun Shipbuilding and Dry Dock Company.

The employer (Sun) admitted the injury but denied the disfigurement.

The Referee found as a fact (No. 2) that the Claimant sustained a "laceration of the nose which having healed, left a residual, oblique scar along the side of the nose which (Conclusion of Law No. 2) was "of such extent and character as to produce an unsightly appearance".

The Referee awarded five weeks compensation. Considering that a maximum of 275 weeks is provided by the Act, we find the Referee's award to be reasonable.

Our own view of the scar reveals it to be serious and unsightly and we so find. We note that it is not usually incident to Claimant's employment.

A much more complex issue raised by Sun's appeal is the jurisdictional one.

Sun contends that jurisdiction under the Pennsylvania Workmen's Compensation Act (PWCA) has been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers Compensation Act (LHWCA) 33 U. S. C. 901.

Counsel for both parties have furnished us excellent briefs on this subject.

Since state workmen's compensation acts could not validly provide coverage to maritime workers (*Southern Pacific Company v. Jensen*, 244 U. S. 205). Congress enacted the LHWCA in 1927.

There seems to be no disagreement here that as originally drafted, the LHWCA was not intended to be an exclusive compensation system. It provided:

> Compensation shall be payable under this chapter . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.

The aforesaid language was interpreted by a series of judicial constructions to create (contrary to its supposed meaning) an area of concurrent state and federal jurisdiction demonstrated most notably in the case of *Calbeck v. Travelers Insurance Company,* 370 U. S. 114.

Despite concurrent federal and state jurisdiction, LHWCA was held not to cover maritime employees involved in shoreside injuries. *Nacirema Operating Company v. Johnson,* 396 U. S. 212.

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Federal coverage was in fact extended beyond the water's edge by the 1972 amendments to LHWCA which extended compensation for disability and death occurring not only upon navigable waters of the United States, but to "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." (33 U. S. C. 903(a)).

In addition, the amendments specifically defined employees and employers in the maritime trade.

There is no dispute here that the Claimant and Sun are employee and employer under LHWCA as amended

or that the Claimant's injury occurred on a landward facility which qualifies for coverage under both PWCA and LHWCA, unless Congress intended to preempt the field.

The 1972 amendment also deleted the limitation on recovery above recited, i.e. "If recovery . . . may not validly be provided by State law".

Sun argues that this deletion is a strong signal that Congress intended preemption. We disagree with this argument. The Supreme Court's creation of the concurrent jurisdiction theory had effectively negated the words "may not validly be provided by State law".

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The rationale for finding lack of preemption, as stated in *Umbehagen* is worth adopting, viz. (250):

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> "On grounds of policy it seems undesirable in the highest degree to construe the amendments as having reintroduced the idea that the federal and state compensation systems are mutually exclusive. That had of course been the construction given to the 1927 Act under the 'may not validly be provided by state law' limitation. That construction led to the horrors of the 'maritime but local' period, from which the Supreme Court rescued us by the invention of the twi-

light zone in the 1942 Davis case. The twilight zone has its own difficulties, conceptual and otherwise, but, in practice it seems to have worked reasonably well. Indeed, a *theory of concurrent jurisdiction* (whether it is called a twilight zone or something else) seems to be the *only sensible way of dealing with state and federal statutes which meet at some vaguely defined line.* If LHCA is taken to be exclusive up to its new territorial limits, injured maritime workers will have to guess at where the new line (piers, wharves and so on which 'adjoin' navigable waters) is located just as such workers during the 1930's and early 1940's had to guess at where the 'maritime but local' line was located. Eventually the Supreme Court would no doubt find the resulting situation intolerable, and would rescue us once again by establishing a new theory of concurrent jurisdiction. But there seems to be no good reason why we should be condemned to relive the depressing episode of the 1927-1942 'maritime but local' LHCA case law.

* * *

If we assume a concurrent jurisdiction (or twilight zone) solution to the problem, what are its limits to be? The pre-1972 twilight zone involved the seaward extension of the coverage of state statutes, not (at least after the *Nacirema* case) the landward extention of the coverage of LHCA. If the only *purpose of twilight zone theory is to make it unnecessary for claimants to guess at the precise location of an invisible line,* that purpose will be served by locating the post-1972 twilight zone at the outer limits of the landward extension of LHCA. Under that approach workers injured at or near the 'adjoining navigable waters' line *should be entitled to claim under either*

the state or the federal act. We have already suggested that 'adjoining' should be broadly construed with respect to claims under LHCA; adoption of a twilight zone approach would allow both the deputy commissioner and his state counterpart to operate on both sides of the line." (Emphasis supplied, footnotes omitted) Gilmore & Black, Law of Admiralty 425-426 (2nd ed. 1975).

The 1972 amendments to the LHWCA were considered by the United States Supreme Court in the case of *Northeast Marine Terminal v. Caputo, et al.,* 45 U. S. Law Week 4729 (June 17, 1977). While that case did not involve the question of preemption or concurrent jurisdiction, significantly the court reviewed the history of the LHWCA and at page 4732 stated:

> Congress' initial apprehension of the difficulties inherent in the existence of two compensation systems for injuries sustained by amphibious workers proved to be well-founded. The courts spent the next 45 years trying to ascertain the respective spheres of coverage of the state and federal systems. As one commentator described it, "the relationship between (LHWCA) and the otherwise applicable State Compensation Act (was) shrouded in impenetrable confusion." G. Gilmore and C. Black, the Law of Admiralty, 409 (2d ed. 1975) (Gilmore). It is unnecessary to examine in detail the Court's efforts to dispel the confusion. Suffice it to say that while the Court permitted recovery under state remedies in particular situations seaward of the *Jensen* line, see, e.g., *Davis v. Department of Labor and Industries of Washington,* 317 U. S. 249 (1942), the Court made it clear that federal coverage stopped at the water's edge. *Nacirema*

Operating Co. v. Johnson, 396 U. S. 212 (1969). (Footnotes omitted)

Since it was the absence of concurrent jurisdiction which led to the "impenetrable confusion", it is highly unlikely that the Supreme Court will rule in a manner to recreate that confusion, or that Congress intended to do so.

We hold that the PWCA is applicable to the claim sub judice and that jurisdiction is not precluded by the LHWCA as amended.

ORDER

The Referee's Finding of Fact, Conclusions of Law and Award are affirmed.

The Defendant's appeal is dismissed.

BY THE BOARD:

/s/ ARTHUR S. HERSKOVITZ
Chairman

CONCURRED IN BY:

/s/ ARTHUR H. REEDE
Commissioner

/s/ EDMUND J. MCCULLOUGH
Commissioner

December 8, 1977

COMMONWEALTH OF PENNSYLVANIA
WORKMEN'S COMPENSATION APPEAL BOARD
HARRISBURG

A-73210

CURTIS L. FIELDS, Claimant
356 North Redfield Street
Philadelphia, Pennsylvania

v.

SUN SHIPBUILDING & DRY DOCK CO., Defendant
Chester, Pennsylvania

Appeal by Claimant from Order of Referee Klevit
District No. 1, S.S. 190-34-3285

REVERSED

Claimant's Counsel:

Joseph Lurie, Esquire
1737 Chestnut Street
Philadelphia, Pennsylvania 19103

Defendant's Counsel:

Andrew J. Forbes, Esquire
215 North Olive Street
Media, Pennsylvania 19063

OPINION

HERSKOVITZ, *Chairman*:

Claimant Curtis L. Fields has appealed the decision of Referee Jerold G. Klevit which found that he suffered a permanent scaring about his left eyebrow on May 2, 1973 which is serious and of such character as to produce an unsightly appearance. The disfigurement was evaluated at 15 weeks.

Since Claimant was admittedly a maritime worker entitled to benefits under the federal Longshoremen's and Harbor Workers Compensation Act (LHWCA), 33 U. S. C. 901, the Referee found as a matter of law that the Pennsylvania Workmen's Compensation Act was not applicable since Congress had pre-empted the field.

Although no appeal was taken by the employer (Sun), it has contested the Findings concerning the extent of disfigurement in its brief.

We find the Referee's evaluation of 15 weeks compensation to be reasonable.

Our own view of the injury reveals a scar about the left eyebrow which is serious, permanent and produces an unsightly appearance. The scar is not usually incident to Claimant's employment.

A much more complex issue raised by Sun's is the jurisdictional one.

Sun contends that jurisdiction under the Pennsylvania Workmen's Compensation Act (PWCA) has been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers Compensation Act (LHWCA), 33 U. S. C. 901.

Counsel for both parties have furnished us excellent briefs on this subject.

Since state workmen's compensation acts could not validly provide coverage to maritime workers (*Southern Pacific Co. v. Jensen*, 244 U. S. 205), Congress enacted the LHWCA in 1927.

There seems to be no disagreement here that as originally drafted, the LHWCA was not intended to be an exclusive compensation system. It provided:

> Compensation shall be payable under this chapter . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.

The aforesaid language was interpreted by a series of judicial constructions to create (contrary to its supposed meaning) an area of concurrent state and federal jurisdiction demonstrated most notably in the case of *Calbeck v. Travelers Insurance Company*, 370 U. S. 114.

Despite concurrent federal and state jurisdiction, LHWCA was held not to cover maritime employees involved in shoreside injuries. *Nacirema Operating Company v. Johnson*, 396 U. S. 212.

After *Nacirema*, it was well established that in certain cases workers could recover under state remedies in particular situations seaward of the piers and docks (*Parker v. Motor Boat Sales*, 314 U. S. 244) and that recovery could be had under LHWCA for injuries occurring on navigable waters which might also have been compensable under state law (*Calbeck*, supra), but that only Congress could extend compensation coverage under LHWCA landward.

Federal coverage was in fact extended beyond the water's edge by the 1972 amendments to LHWCA which extended compensation for disability and death occurring not only upon navigable waters of the United States, but to "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily

used by an employer in loading, unloading, repairing, or building a vessel." (33 U. S. C. 903(a)).

In addition, the amendments specifically defined employees and employers in the maritime trade.

There is no dispute here that the Claimant and Sun are employee and employer under LHWCA as amended or that the Claimant's injury occurred on a landward facility which qualifies for coverage under both PWCA and LHWCA, unless Congress intended to pre-empt the field.

The 1972 amendment also deleted the limitation on recovery above recited, i.e. "If recovery . . . may not validly be provided by State law".

Sun argues that this deletion is a strong signal that Congress intended pre-emption. We disagree with this argument. The Supreme Court's creation of the concurrent jurisdiction theory had effectively negated the words "may not validly be provided by State law".

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The pre-emption issue has been decided in one reported case, *Umbehagen v. Equitable Equipment Company,* 329 S. 2d 245 (LA. Cir. Ct. App.).

The rationale for finding lack of pre-emption, as stated in *Umbehagen* is worth adopting, viz. (250):

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> "On grounds of policy it seems undesirable in the highest degree to construe the amendments as having reintroduced the idea that the federal and state compensation systems are mutually exclusive. That had

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> "If we assume a concurrent jurisdiction (or twilight zone) solution to the problem, what are its limits to be? The pre-1972 twilight zone involved the seaward extension of the coverage of state statutes, not (at least after the *Nacirema* case) the landward extension of the coverage of LHCA. If the only *purpose of twilight zone theory is to make it unnecessary for claimants to guess at the precise location of an*

> *invisible line,* that purpose will be served by locating the post-1972 twilight zone at the outer limits of the landward extension of LHCA. Under that approach workers injured at or near the 'adjoining navigable waters' line *should be entitled to claim under either the state or the federal act.* We have already suggested that 'adjoining' should be broadly construed with respect to claims under LHCA; adoption of a twilight zone approach would allow both the deputy commissioner and his state counter-part to operate on both sides of the line."
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> (Emphasis supplied, footnotes omitted) Gilmore & Black, Law of Admiralty 425-426 (2nd ed. 1975).

The 1972 amendments to the LHWCA were considered by the United States Supreme Court in the case of *Northeast Marine Terminal v. Caputo, et al.*, 45 U. S. Law Week 4729 (June 17, 1977). While that case did not involve the question of pre-emption or concurrent jurisdiction, significantly the court reviewed the history of the LHWCA and at page 4732 stated:

> Congress' initial apprehension of the difficulties inherent in the existence of two compensation systems for injuries sustained by amphibious workers proved to be well-founded. The courts spent the next 45 years trying to ascertain the respective spheres of coverage of the state and federal systems. As one commentator described it, "the relationship between (LHWCA) and the otherwise applicable State Compensation Act (was) shrouded in impenetrable confusion." G. Gilmore and C. Black, the Law of Admiralty, 409 (2d ed. 1975) (Gilmore). It is unnecessary to examine in detail the Court's efforts to dispel the confusion. Suffice it to say that while the Court permitted recovery under state remedies in particular situations seaward of the *Jensen* line, see, e.g., *Davis v. Department of Labor and Industries of Washington,* 317 U. S. 249 (1942), the Court made it clear that federal coverage stopped at the water's edge. *Nacirema Operating Co. v. Johnson,* 396 U. S. 212 (1969). (Footnotes omitted).

Since it was the absence of concurrent jurisdiction which led to the "impenetrable confusion", it is highly unlikely that the Supreme Court will rule in a manner to recreate that confusion, or that Congress intended to do so.

We hold that the PWCA is applicable to the claim sub judice and that jurisdiction is not precluded by the LHWCA as amended.

ORDER

The Claimant's appeal is sustained.

The Referee's Findings of Fact are affirmed.

The Referee's Conclusions of Law and Order are vacated and in substitution thereof are entered the following:

CONCLUSIONS OF LAW

FIRST: Both Claimant and Defendant were bound by the provisions of the Pennsylvania Workmen's Compensation Act. Although the Longshoremen's and Harbor Worker's Compensation Act is also applicable in cases of this kind, it does not exclude the state from the exercise of jurisdiction in the area and under the circumstances prevailing here.

SECOND: Claimant, having sustained serious and permanent facial disfigurement as above described, of

such character and extent as to produce an unsightly appearance, such as is not usually incident to Claimant's employment, is entitled to compensation therefor under the provisions of the Pennsylvania Workmen's Compensation Act.

THIRD: Disfigurement is valued as equivalent to 15 weeks of compensation under the Pennsylvania Workmen's Compensation Act.

AWARD

Sun Shipbuilding and Dry Dock Company is ordered and directed to pay Curtis L. Fields compensation for permanent and unsightly facial disfigurement at the rate of $100.00 per week beginning May 2, 1973 and continuing thereafter for a period of 15 weeks together with interest at the rate of 10 percent per annum on deferred installments.

APPROVAL OF ATTORNEY'S FEE

There shall be paid directly to Joseph Lurie, Esquire, out of the compensation awarded, counsel fees equal to 20 percent of the total paid as compensation.

BY THE BOARD:

/s/ ARTHUR S. HERSKOVITZ
Chairman

CONCURRED IN BY:

/s/ ARTHUR H. REEDE
Commissioner

/s/ EDMUND J. MCCULLOUGH
Commissioner

December 8, 1977

COMMONWEALTH OF PENNSYLVANIA
WORKMEN'S COMPENSATION APPEAL BOARD
HARRISBURG

A-73219

FRANK JANUZCIEWICZ, Claimant
1112 Brown Street
Chester, Pennsylvania 19013

v.

SUN SHIPBUILDING & DRY DOCK CO., Defendant
Chester, Pennsylvania 19013

Appeal by Defendant from Award of Referee Troilo
District No. 1, S.S. 195-12-9304

AFFIRMED

Claimant's Counsel:

Marc Jacobs, Esquire
1737 Chestnut Street
Philadelphia, Pennsylvania 19103

Defendant's Counsel:

Andrew J. Forbes, Esquire
215 North Olive Street
Media, Pennsylvania 19063

OPINION

HERSKOVITZ, *Chairman*:

In this case, Referee Fred J. Troilo found that Frank Januzciewicz sustained a job-related injury on January 30,

1974 which resulted in serious disfigurement consisting of a scar about one inch long over the left forehead and extending into the eyebrow (Finding of Fact No. 2).

The scar produced an unsightly appearance such as is not usually incident to Claimant's employment (Conclusion of Law No. 2).

Compensation of five weeks duration was awarded.

We find the Referee's award of five weeks compensation to be reasonable. Our own observation of the injury reveals a serious, permanent scar of the left area of the forehead producing an unsightly appearance such as is not usually incident to Claimant's employment.

A much more complex issue raised by Sun's appeal is the jurisdictional one.

Sun contends that jurisdiction under the Pennsylvania Workmen's Compensation Act (PWCA) has been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers Compensation Act (LHWCA), 33 U. S. C. 901.

Counsel for both parties have furnished us excellent briefs on this subject.

Since state workmen's compensation acts could not validly provide coverage to maritime workers (*Southern Pacific Company v. Jensen*, 244 U. S. 205), Congress enacted the LHWCA in 1927.

There seems to be no disagreement here that as originally drafted, the LHWCA was not intended to be an exclusive compensation system. It provided:

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In addition, the amendments specifically defined employees and employers in the maritime trade.

There is no dispute here that the Claimant and Sun are employee and employer under LHWCA as amended or that the Claimant's injury occurred on a landward facility which qualifies for coverage under both PWCA and LHWCA, unless Congress intended to preempt the field.

The 1972 amendment also deleted the limitation on recovery above recited, i.e. "If recovery . . . may not validly be provided by State law".

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Since it was the absence of concurrent jurisdiction which led to the "impenetrable confusion", it is highly unlikely that the Supreme Court will rule in a manner to recreate that confusion, or that Congress intended to do so.

We hold that the PWCA is applicable to the claim sub judice and that jurisdiction is not precluded by the LHWCA as amended.

ORDER

The Referee's Findings of Fact, Conclusions of Law and Award are affirmed.

The Defendant's appeal is dismissed.

BY THE BOARD:

/s/ ARTHUR S. HERSKOVITZ
Chairman

CONCURRED IN BY:

/s/ ARTHUR H. REEDE
Commissioner

/s/ EDMUND J. MCCULLOUGH
Commissioner

December 8, 1977

COMMONWEALTH OF PENNSYLVANIA
WORKMEN'S COMPENSATION APPEAL BOARD
HARRISBURG

A-73220

JOSEPH C. KIMMEL, Claimant
230 Pennell Road
Aston, Pennsylvania 19014

v.

SUN SHIPBUILDING & DRY DOCK CO., Defendant
Chester, Pennsylvania 19013

Appeal by Defendant from Award of Referee Troilo
District No. 1, S.S. 195-36-0437

AFFIRMED

Claimant's Counsel:

Roland Artigues, Esquire
1737 Chestnut Street
Philadelphia, Pennsylvania 19103

Defendant's Counsel:

Andrew Forbes, Esquire
215 North Olive Street
Media, Pennsylvania 19063

OPINION

HERSKOVITZ, *Chairman*:

This appeal involves Referee Fred J. Troilo's award of compensation for disfigurement consisting of a circular scar on the right cheek, serious and permanent (Finding of Fact No. 2) producing an unsightly appearance not usually incident to Claimant's employment (Conclusion of Law No. 2).

The employer (Sun) admitted the injury but denied the extent of the disfigurement.

There is no dispute that the injury ocurred on June 2, 1975 in a shop building of Sun located across from a dry dock on the Delaware River.

Eight weeks compensation was awarded.

We find this award to be reasonable under the Pennsylvania Workmen's Compensation Act.

Our view of the Claimant revealed a serious permanent scar of the right cheek producing an unsightly appearance.

A much more complex issue raised by Sun's appeal is the jurisdictional one.

Sun contends that jurisdiction under the Pennsylvania Workmen's Compensation Act (PWCA) has been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers Compensation Act (LHWCA) 33 U. S. C. 901.

Counsel for both parties have furnished us excellent briefs on this subject.

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There seems to be no disagreement here that as originally drafted, the LHWCA was not intended to be an exclusive compensation system. It provided:

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zone has its own difficulties, conceptual and otherwise, but, in practice, it seems to have worked reasonably well. Indeed, a *theory of concurrent jurisdiction* (whether it is called a twilight zone or something else) seems to be the *only sensible way of dealing with state and federal statutes which meet at some vaguely defined line.* If LHCA is taken to be exclusive up to its new territorial limits, injured maritime workers will have to guess at where the new line (piers, wharves and so on which 'adjoin' navigable waters) is located just as such workers during the 1930's and early 1940's had to guess at where the 'maritime but local' line was located. Eventually the Supreme Court would no doubt find the resulting situation intolerable, and would rescue us once again by establishing a new theory of concurrent jurisdiction. But there seems to be no good reason why we should be condemned to relive the depressing episode of the 1927-1942 'maritime but local' LHCA case law.

* * *

"If we assume a concurrent jurisdiction (or twilight zone) solution to the problem, what are its limits to be? The pre-1972 twilight zone involved the seaward extension of the coverage of state statutes, not (at least after the *Nacirema* case) the landward extension of the coverage of LHCA. If the only *purpose of twilight zone theory is to make it unnecessary for claimants to guess at the precise location of an invisible line,* that purpose will be served by locating the post-1972 twilight zone at the outer limits of the landward extension of LHCA. Under that approach workers injured at or near the 'adjoining navigable waters' line *should be entitled to claim under either the state or the federal act.* We have already suggested that 'adjoining' should be broadly construed with respect to claims under LHCA; adoption of a twilight zone approach would allow both the deputy commissioner and his state counterpart to operate on both sides of the line." (Emphasis supplied, footnotes omitted) Gilmore & Black, Law of Admiralty 425-426 (2nd ed. 1975).

The 1972 amendments to the LHWCA were considered by the United States Supreme Court in the case of *Northeast Marine Terminal v. Caputo, et al.,* 45 U. S. Law Week 4729 (June 17, 1977). While that case did not involve the question of preemption or concurrent jurisdiction, significantly the court reviewed the history of the LHWCA and at page 4732 stated:

> Congress' initial apprehension of the difficulties inherent in the existence of two compensation systems for injuries sustained by amphibious workers proved to be well-founded. The courts spent the next 45 years trying to ascertain the respective spheres of coverage of the state and federal systems. As one commentator described it, "the relationship between (LHWCA) and the otherwise applicable State Compensation Act (was) shrouded in impenetrable confusion." G. Gilmore and C. Black, The Law of Admiralty, 409 (2d ed. 1975) (Gilmore). It is unnecessary to examine in detail the Court's efforts to dispel the confusion. Suffice it to say that while the Court permitted recovery under state remedies in particular situations seaward of the *Jensen* line, see, e.g., *Davis v. Department of Labor and Industries of Washington,* 317 U. S. 249 (1942), the Court made it clear that federal coverage stopped at the water's edge. *Nacirema Operating Co. v. Johnson,* 396 U. S. 212 (1969). (Footnotes omitted)

Since it was the absence of concurrent jurisdiction which led to the "impenetrable confusion", it is highly unlikely that the Supreme Court will rule in a manner to recreate that confusion, or that Congress intended to do so.

We hold that the PWCA is applicable to the claim sub judice and that jurisdiction is not precluded by the LHWCA as amended.

ORDER

The Referee's Findings of Fact, Conclusions of Law and Award are affirmed.

The Defendant's appeal is dismissed.

BY THE BOARD:

/s/ ARTHUR S. HERSKOVITZ
Chairman

CONCURRED IN BY:

/s/ ARTHUR H. REEDE
Commissioner

/s/ EDMUND J. MCCULLOUGH
Commissioner

December 8, 1977

COMMONWEALTH OF PENNSYLVANIA
WORKMEN'S COMPENSATION APPEAL BOARD
HARRISBURG

A-73218

WILLIE MOORE, Claimant
1707 West Seventh Street
Chester, Pennsylvania 19013

v.

SUN SHIPBUILDING & DRY DOCK CO., Defendant
Chester, Pennsylvania 19013

Appeal by Defendant from Award of Referee Troilo
District No. 1, S.S. 171-26-2668

AFFIRMED

Claimant's Counsel:

Roland Artigues, Esquire
1737 Chestnut Street
Philadelphia, Pennsylvania 19103

Defendant's Counsel:

Andrew Forbes, Esquire
215 North Olive Street
Media, Pennsylvania 19063

OPINION

HERSKOVITZ, *Chairman:*

The Claim Petition of Willie Moore alleged that on May 13, 1973 while working on a way (pier) of the Defendant (Sun) located in the Delaware River, he sustained an injury resulting in serious and permanent facial disfigurement.

Referee Fred J. Troilo found the injury to have resulted in a residuum of a scar along the lower border of the right eye above the cheek bone approximately three-quarters of an inch long (Finding of Fact No. 2). The disfigurement was found serious, permanent and of such character to produce an unsightly appearance. Eight weeks compensation was awarded.

Sun does not dispute the time or place of the injury but denies the degree of disfigurement.

We find the award of eight weeks compensation reasonable. Our own view of the injury reveals a scar above the right eye three-quarters of an inch long which is serious, permanent and produces an unsightly appearance not usually incident to Claimant's employment.

A much more complex issue raised by Sun's appeal is the jurisdictional one.

Sun contends that jurisdiction under the Pennsylvania Workmen's Compensation Act (PWCA) has been preempted by the 1972 amendments to the Federal Longshoremen's and Harbor Workers Compensation Act (LHWCA), 33 U. S. C. 901.

Counsel for both parties have furnished us excellent briefs on this subject.

Since state workmen's compensation acts could not validly provide coverage to maritime workers (*Southern Pacific Company v. Jensen,* 244 U. S. 205), Congress enacted the LHWCA, in 1927.

There seems to be no disagreement here that as originally drafted, the LHWCA was not intended to be an exclusive compensation system. It provided:

> Compensation shall be payable under this chapter . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.

The aforesaid language was interpreted by a series of judicial constructions to create (contrary to its supposed meaning) an area of concurrent state and federal jurisdiction demonstrated most notably in the case of *Calbeck v. Travelers Insurance Company,* 370 U. S. 114.

Despite concurrent federal and state jurisdiction, LHWCA was held not to cover maritime employees involved in shoreside injuries. *Nacirema Operating Company v. Johnson,* 396 U. S. 212.

After *Nacirema,* it was well established that in certain cases workers could recover under state remedies in particular situations seaward of the piers and docks (*Parker v. Motor Boat Sales,* 314 U. S. 244) and that recovery could be had under LHWCA for injuries occurring on navigable waters which might also have been compensable under state law (*Calbeck,* supra), but that only Congress could extend compensation coverage under LHWCA landward.

Federal coverage was in fact extended beyond the water's edge by the 1972 amendments to LHWCA which extended compensation for disability and death occurring not only upon navigable waters of the United States, but to "any adjoining pier, warf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." (33 U. S. C. 903(a)).

In addition, the amendments specifically defined employees and employers in the maritime trade.

There is no dispute here that the Claimant and Sun are employee and employer under LHWCA as amended or that the Claimant's injury occurred on a landward facility which qualifies for coverage under both PWCA and LHWCA, unless Congress intended to preempt the field.

The 1972 amendment also deleted the limitation on recovery above recited, i.e. "If recovery . . . may not validly be provided by State law".

Sun argues that this decision is a strong signal that Congress intended preemption. We disagree with this argument. The Supreme Court's creation of the concurrent jurisdiction theory had effectively negated the words "may not validly be provided by State law".

The 1972 amendment accepted this reality.

The preemption issue has been decided in one reported case, *Umbehagen v. Equitable Equipment Company,* 329 S. 2d 245 (LA. Cir. Ct. App.).

The rationale for finding lack of preemption, as stated in *Umbehagen* is worth adopting, viz. (250):

> Nor can we say that the Congresional action was so pervasive as to compel the conclusion that state law could no longer operate within the expanded territorial limits. Indeed, academic discussion of the expanded jurisdiction has suggested that concurrent jurisdiction is the only workable policy, the following being particularly pertinent:
>
> "On grounds of policy it seems undesirable in the highest degree to construe the amendments as having reintroduced the idea that the federal and state compensation systems are mutually exclusive. That had of course been the construction given to the 1927 Act under the 'may not validly be provided by state law' limitation. That construction led to the horrors of the 'maritime but local' period, from which the Supreme Court rescued us by the invention of the twilight zone in the 1942 Davis case. The twilight zone has its own difficulties, conceptual and otherwise, but, in practice it seems to have worked reasonably well. Indeed, a *theory of concurrent jurisdiction* (whether it is called a twilight zone or something else) seems to be the *only sensible way of dealing with state and federal statutes which meet at some vaguely defined line.* If LHCA is taken to be exclusive up to its new territorial limits, injured maritime workers will have to guess at where the new line (piers, wharves and so on which 'adjoin' navigable waters) is located just as such workers during the 1930's and early 1940's had to guess at where the 'maritime but local' line was located. Eventually the Supreme Court would no doubt find the resulting situation intolerable, and would rescue us once again by establishing a new theory of concurrent jurisdiction. But there seems to be no good reason why we should be condemned to relive the depressing episode of the 1927-1942 'maritime but local' LHCA case law.
>
> * * *
>
> "If we assume a concurrent jurisdiction (or twilight zone) solution to the problem, what are its limits to be? The pre-1972 twilight zone involved the seaward extension of the coverage of state statutes, not (at least after the *Nacirema* case) the landward extension of the coverage of LHCA. If the only *purpose of twilight zone theory is to make it unnecessary for claimants to guess at the precise location of an invisible line,* that purpose will be served by locating the

> post-1972 twilight zone at the outer limits of the landward extension of LHCA. Under that approach workers injured at or near the 'adjoining navigable waters' line *should be entitled to claim under either the state or the federal act.* We have already suggested that 'adjoining' should be broadly construed with respect to claims under LHCA; adoption of a twilight zone approach would allow both the deputy commissioner and his state counterpart to operate on both sides of the line." (Emphasis supplied, footnotes omitted). Gilmore & Black, Law of Admiralty 425-426 (2nd ed. 1975).

The 1972 amendments to the LHWCA were considered by the United States Supreme Court in the case of *Northeast Marine Terminal v. Caputo, et al.*, 45 U. S. Law Week 4729 (June 17, 1977). While that case did not involve the question of preemption or concurrent jurisdiction, significantly the court reviewed the history of the LHWCA and at page 4732 stated:

> Congress' initial apprehension of the difficulties inherent in the existence of two compensation systems for injuries sustained by amphibious workers proved to be well-founded. The courts spent the next 45 years trying to ascertain the respective spheres of coverage of the state and federal systems. As one commentator described it, "the relationship between (LHWCA) and the otherwise applicable State Compensation Act (was) shrouded in impenetrable confusion." G. Gilmore and C. Black, The Law of Admiralty, 409 (2d ed. 1975) (Gilmore). It is unnecessary to examine in detail the Court's efforts to dispel the confusion. Suffice it to say that while the Court permitted recovery under state remedies in

> particular situations seaward of the *Jensen* line, see, *e.g., Davis v. Department of Labor and Industries of Washington,* 317 U. S. 249 (1942), the Court made it clear that federal coverage stopped at the water's edge. *Nacirema Operating Co. v. Johnson,* 396 U. S. 212 (1969). (Footnotes omitted.)

Since it was the absence of concurrent jurisdiction which led to the "impenetrable confusion", it is highly unlikely that the Supreme Court will rule in a manner to recreate that confusion, or that Congress intended to do so.

We hold that the PWCA is applicable to the claim sub judice and that jurisdiction is not precluded by the LHWCA as amended.

ORDER

The Referee's Findings of Fact, Conclusions of Law and Award are affirmed.

The Defendant's appeal is dismissed.

BY THE BOARD:

/s/ ARTHUR S. HERSKOVITZ
Chairman

CONCURRED IN BY:

/s/ ARTHUR H. REEDE
Commissioner

/s/ EDMUND J. MCCULLOUGH
Commissioner

December 8, 1977

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF OCCUPATIONAL INJURY AND
DISEASE COMPENSATION
Harrisburg, Pennsylvania 17120

REFEREE'S DECISION

Claim 195-05-9634

JOHN APRIL, Claimant
309 Donely Avenue
Aston, Penna. 19014

v.

SUN SHIPBUILDING & DRY DOCK
COMPANY, Defendant
Chester, Penna.
Self-Insured

BEFORE:

Referee Fred J. Troilo
1521 State Office Building
Philadelphia, Penna. 19130

A hearing was scheduled in this matter at the Toal Building, 2nd and Orange Streets, Media, Penna. on February 25, 1976 (concluded).

RECORD

Claimant filed his Petition for Compensation for facial disfigurement on December 5, 1975. Defendant filed a responsive Answer thereto.

FINDINGS OF FACT

The Referee makes the following Findings of Fact:

1. Claimant sustained a work-related injury on January 8, 1975 while in the employ of the Defendant which resulted in serious and permanent facial disfigurement.

2. The nature and cause of the injury were a laceration of the nose, which having healed, left a residual, oblique scar along the side of the nose, caused when Claimant was struck by flying metal as he operated a chipping hammer located on Defendant's dry dock.

3. There was no loss of time and Claimant incurred no medical expense as a result of the injury; however, the Defendant resists this action principally on the ground of lack of jurisdiction in the State of Pennsylvania to entertain the same in that the Longshoremen's and Harbor Worker's Compensation Act of 1972 has pre-empted exclusive jurisdiction in this area.

4. The Referee in resolving this issue, relies on the decision of the Court of Appeals of Louisiana for the fourth circuit in the case of Oscar Umbehagen v. Equitable Equipment Company #6946, decided March 16, 1976 and not yet reported but furnished the Referee through the Office of the Solicitor for the United States Department of Labor as the position adopted by the Director of the Office of Worker's Compensation Programs of the United States Department of Labor.

That decision holds that the Longshoremen's and Harbor Worker's Compensation Act does not pre-empt otherwise applicable state compensation laws under circumstances where state law provides a more favorable remedy.

In the above cited case, the Louisiana Court had before it the single and precise issue as is here raised and

held that both the Longshoremen's and Harbor Worker's Compensation Act and the State Compensation Laws can be concurrently applicable to an employment injury in the same manner as two states compensation laws can be, especially in an area where there is no conflict between the two systems sufficient to compel a divestiture of state power.

5. Claimant earned wages sufficient to entitle him to compensation at the maximum compensation rate where applicable.

Conclusions of Law

The Referee makes the following Conclusions of Law:

1. Both Claimant and Defendant were bound by the provisions of the Pennsylvania Workmen's Compensation Act. Even though the Federal Longshoremen's and Harbor Worker's Compensation Act is also applicable, it does not exclude the state from the exercise of jurisdiction in the area and under the circumstances prevailing here.

2. Claimant, having sustained serious and permanent facial disfigurement, as above described, of such character and extent as to produce an unsightly appearance, such as is not usually incident to Claimant's employment, he is entitled to compensation therefor under the provisions of the Pennsylvania Workmen's Compensation Act.

3. The Referee values the disfigurement as equivalent to approximately five weeks of compensation under the provisions of the Pennsylvania Workmen's Compensation Act.

Award

Compensation is Awarded and the Defendant, Sun Shipbuilding & Dry Dock Company, hereby Ordered and

Directed to pay to the Claimant, John April, compensation for permanent and unsightly facial disfigurement at the rate of $114.00 per week beginning January 3, 1975 and continuing thereafter for a period of five weeks; together with interest at the rate of 10% per annum on all deferred amounts of compensation payable hereunder.

All, in accordance with the provisions of the Pennsylvania Workmen's Compensation Act.

Approval of Attorney Fee

The Referee approves an attorney fee to Claimant's counsel in the approximate equivalent of 20% of the gross award to the Claimant herein in the specific amount of $125.00, same to be charged against the Award to the Claimant and paid directly to Roland J. Artigues, Esquire, with the balance of the Award being paid to the Claimant personally.

/s/ Fred J. Troilo
Fred J. Troilo, Referee
First District

Phila., Pa.
April 25, 1977
pm

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF OCCUPATIONAL INJURY AND
DISEASE COMPENSATION
Harrisburg, Pennsylvania 17120

REFEREE'S DECISION

Claim Petition 190-34-3285

CURTIS L. FIELDS, Claimant
356 N. Redfield Street
Philadelphia, Penna.

v.

SUN SHIPBUILDING & DRY DOCK
COMPANY, Defendant
Chester, Penna.
(a self-insured employer)

BEFORE:

Referee Jerold G. Klevit
1509 State Office Building
Philadelphia, Penna. 19130

Hearings were scheduled in the above-captioned matter at the office of the Referee as follows: April 15, 1976 and June 17, 1976.

RECORD

Claimant filed a Claim Petition for disfigurement which he alleges resulted from an injury he sustained during the course of his employment with Defendant. Defendant filed an Answer which pleads that exclusive jurisdiction lies under the Federal Longshoremen's and Harbor Worker's Compensation Act.

FINDINGS OF FACT

1. On May 2, 1973, Claimant struck his head upon a rail which caused a one inch permanent scar about his left eyebrow. As a result, Claimant missed a short time from work which does not exceed the statutory waiting period. The injury took place in an area customarily employed by the Defendant for shipbuilding and ship repair.

2. At the time of the aforesaid injury Claimant was in the employ of Defendant, which is in the business of shipbuilding and ship repair, and Claimant's average weekly wage was $145.60.

3. The scar referred to in Finding of Fact No. 1 is serious and permanent and is of such a character as to produce an unsightly appearance, and said scar is such as is not usually incident to Claimant's employment. The Referee evaluates Claimant's disfigurement at 15 weeks.

CONCLUSIONS OF LAW

1. At the time Claimant sustained his injury of May 2, 1973, he was in the employ of an employer falling within the exclusive jurisdiction of the Federal Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. Sec. 901, et seq., as amended.

2. Claimant's injury is not covered by the Pennsylvania Workmen's Compensation Act since Congress has occupied the field with respect to injuries sustained by employees of maritime employers, which employees are covered by the Federal Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. Sec. 901 et seq., as amended.

3. Claimant's Petition for Compensation must be dismissed.

ORDER

AND NOW, this 22nd day of April 1977, it is ORDERED that the Claim Petition filed herein be and it is hereby DISMISSED.

/s/ JEROLD G. KLEVIT
Jerold G. Klevit, Referee
First District

Phila. Pa.

April 26, 1977

pm

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF OCCUPATIONAL INJURY AND
DISEASE COMPENSATION
Harrisburg, Pennsylvania 17120

REFEREE'S DECISION

Claim Petition 195-12-9304

FRANK JANUZCIEWICZ, Claimant
1112 Brown Street
Chester, Pennsylvania 19013

v.

SUN SHIPBUILDING & DRY DOCK
COMPANY, Defendant
Chester, Pennsylvania 19013
(Self-insured)

BEFORE:

Referee Fred J. Troilo
Room 1521 State Office Building
Philadelphia, Pennsylvania 19130

Hearing was scheduled in the above-captioned matter at the Toal Building, Second & Orange Streets, Media, Pennsylvania as follow: May 12, 1976 (case concluded). (Reporter: Norman DiGrazio).

RECORD

Claimant filed his Petition for Compensation for facial disfigurement on February 9, 1976. Defendant filed a responsive Answer thereto.

Findings of Fact

From the evidence offered, the Referee makes the following Findings of Fact:

1. Claimant sustained a work-relatd injury on or about January 30, 1974 while in the employ of the Defendant which resolved itself after treatment into a permanent and serious facial disfigurement.

2. The nature and cause of the injury were a bruised and lacerated forehead, which after treatment, shows a "residual scar about one-inch long over the left forehead" and extending into the eyebrow, caused when a metal washer struck Claimant in the face.

3. Claimant lost no time from his work. There are no medical expenses involved. The Defendant admits the injury but resists the Claimant's action on the sole ground that the state of Pennsylvania has no jurisdiction in this matter since the Federal Longshoremen's and Harbor Worker's Act of 1972 has pre-empted jurisdiction in this area to the exclusion of State law.

4. In resolving this issue the Referee relies on the decision of the Court of Appeals of Louisiana for the fourth circuit, to wit, in the case of Umbehagen v. Equitable Equipment Company #6946, decided on March 16, 1976 and not yet reported, but furnished the Referee through the Office of the Solicitor General of the United States Department of Labor as the position adopted by the Director of the Office of Worker's Compensation Programs of the Federal Department of Labor.

The decision holds that the Longshoremen's and Harbor Worker's Compensation Act of 1972 does not preempt otherwise applicable state compensation laws under circumstances where state law provides a more favorable remedy. The above cited case was resolved on that sole

and single issue and the Court held that both the Longshoremen's and Harbor Worker's Compensation Act and the state compensation laws can be concurrently applicable to an employment injury in the same manner as two states compensation laws can; especially in an area where there is no conflict between the two systems sufficient to compel a total divestiture of power.

5. The Claimant earned wages that would entitled him to the maximum compensation payable where and when applicable.

Conclusions of Law

The Referee makes the following Conclusions of Law:

1. Both Claimant and Defendant were bound by the provisions of the Pennsylvania Workmen's Compensation Act. Although the Longshoremen's and Harbor Worker's Compensation Act is also applicable in cases of this kind, it does not exclude the state from the exercise of jurisdiction in the area and under the circumstances prevailing here.

2. Claimant, having sustained serious and permanent facial disfigurement as above described of such character and extent as to produce an unsightly appearance, such as is not usually incident to the Claimant's employment is entitled to compensation therefor under the provisions of the Pennsylvania Workmen's Compensation Act.

3. The Referee values the disfigurement in this case as equivalent to appoximately five weeks of compensation under the provisions of the Pennsylvania Workmen's Act.

Award

Compensation is Awarded and the Defendant, Sun Shipbuilding and Drydock Company, hereby Ordered and

DIRECTED to pay to the Claimant, Frank Januzciewicz, compensation for permanent and unsightly facial disfigurement at the rate of $106.00 per week beginning January 30, 1974 and continuing thereafter for a period of five weeks; together with interest at the rate of 10% per annum on all deferred amounts of compensation payable hereunder.

All, in accordance with the provisions of the Pennsylvania Workmen's Compensation Act.

APPROVAL OF ATTORNEY FEE

The Referee approves an attorney fee approximating 20% of the total AWARD to the Claimant in the specific amount of $160.00 same to be paid directly to the Claimant's attorney, Marc Jacobs, Esquire, and charged against the foregoing AWARD to the Claimant, with the balance of said AWARD being paid to the Claimant personally.

/s/ FRED J. TROILO
Fred J. Troilo, Referee
First District

Philadelphia, Pennsylvania
April 25, 1977
mjm

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF OCCUPATIONAL INJURY AND
DISEASE COMPENSATION
Harrisburg, Pennsylvania 17120

REFEREE'S DECISION

Claim 195-36-0437

JOSEPH C. KIMMEL, Claimant
230 Pennell Road
Aston, Pennsylvania 19014

v.

SUN SHIPBUILDING & DRY DOCK
COMPANY, Defendant
Chester, Penna. 19013
Self-Insured

BEFORE:

Referee Fred J. Troilo
1521 State Office Building
Philadelphia, Penna. 19130

Hearings in the above-entitled case were scheduled at the Toal Building, 2nd and Orange Streets, Media, Penna. as follows: October 27, 1975 (continued); January 5, 1976, evidence entered and case concluded. (Reporter: Robert Cohen).

RECORD

Claimant filed his Petition for Compensation for facial disfigurement on August 28, 1975. Defendant filed a responsive Answer thereto.

Findings of Fact

From the evidence offered, the Referee makes the following Findings of Fact:

1. Claimant sustained an injury on June 2, 1975 while in the employ of the Defendant, which resulted in permanent and serious facial disfigurement.

2. The nature and cause of the injury were a burn on the right cheek, caused when while Claimant was holding a piece of metal for welding, the welder lifted his shield and the hot rod used to make the weld struck Claimant on the right side of the face. After treatment, the burn resolved itself into a circular scar on the right cheek, which is both serious and permanent in its effect.

3. Claimant earned wages which would entitle him to the maximum compensation rate when and where applicable.

4. No compensation has been paid.

5. Claimant lost no time from his work and no medical expense has been incurred.

6. This claim is resisted by the Defendant on the single ground that the State of Pennsylvania has no jurisdiction to entertain the claim since the Federal Longshoremen's and Harbor Worker's Act of 1972 has pre-empted all authority in this area to the exclusion of state law.

7. The Referee, in resolving this issue, relies on the decision of the Court of Appeals of Louisiana for the Fourth Circuit pronounced in the case of Oscar Umbehagen v. Equitable Equipment Company #6946, decided March 16, 1976 and not yet reported, but furnished the Referee through the Office of the Solicitor for the United States Department of Labor as the position adopted by

the Director of the Office of Worker's Compensation Programs of the United States Department of Labor.

The above cited decision holds that the Longshoremen's and Harbor Worker's Compensation Act of 1972 does not pre-empt otherwise applicable state compensation laws under circumstances where state law provides a more favorable remedy. It may be noted that the Umbehagen case was resolved on the precise issue as that in the present case and the Court held that both the Longshoremen's and Harbor Worker's Compensation Act and the State Compensation Laws can be concurrently applicable to an employment injury in the same manner as two states' compensation laws can; especially in the area where there is no conflict between the two systems sufficient to compel a total divestiture of state power.

Conclusions of Law

The Referee makes the following Conclusions of Law:

1. Both Claimant and Defendant were bound by the provisions of the Pennsylvania Workmen's Compensation Act. Although the Longshoremen's and Harbor Worker's Compensation Act is also applicable in cases of this kind, it does not exclude the state from the exercise of jurisdiction in the area and under the circumstances prevailing here.

2. Claimant, having sustained serious and permanent facial disfigurement as above described, of such character and extent as to produce an unsightly appearance, such as is not usually incident to Claimant's employment, he is entitled to compensation therefor under the provisions of the Pennsylvania Workmen's Compensation Act.

3. The Referee values the disfigurement in this case as equivalent to approximately eight weeks of compensa-

tion under the provisions of the Pennsylvania Workmen's Compensation Act.

AWARD

Compensation is Awarded and the Defendant, Sun Shipbuilding & Dry Dock Company, hereby ORDERED and DIRECTED to pay to the Claimant, Joseph C. Kimmel, compensation for permanent and unsightly facial disfigurement at the rate of $114.00 per week beginning June 2, 1975 and continuing thereafter up to but not including July 1, 1975; compensation at the rate of $171.00 per week beginning July 1, 1975 and continuing thereafter up to but not including July 27, 1975; together with interest at the rate of 10% per annum on all deferred amounts of compensation payable hereunder.

All, in accordance with the provisions of the Pennsylvania Workmen's Compensation Act.

APPROVAL OF ATTORNEY FEE

The Referee approves an attorney fee approximating 20% of the total Award to the Claimant in the specific amount of $235.00, same to be paid directly to the Claimant's attorney, Roland J. Artigues, Esquire, and charged against the foregoing Award to the Claimant, with the balance of the said Award being paid to the Claimant personally.

/s/ FRED J. TROILO
Fred J. Troilo, Referee
First District

Phila., Pa.

April 25, 1977

pm

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF OCCUPATIONAL INJURY AND
DISEASE COMPENSATION
Harrisburg, Pennsylvania 17120

REFEREE'S DECISION

Claim Petition 171-26-2668

WILLIE MOORE, Claimant
1707 West 7th Street
Chester, Pennsylvania 19013

v.

SUN SHIPBUILDING & DRY DOCK
COMPANY, Defendant
Chester, Pennsylvania 19013
Self-insured

BEFORE:

Referee Fred J. Troilo
1521 State Office Building
Philadelphia, Penna. 19130

Hearings in the above-entitled case were scheduled at the Toal Building, 2nd and Orange Streets, Media, Pennsylvania as follows: January 8, 1976, testimony taken and case concluded. (Reporter: Robert Cohen)

RECORD

Claimant filed his Petition for Compensation for facial disfigurement on November 21, 1975. Defendant filed a responsive Answer thereto.

Findings of Fact

From the evidence offered, the Referee makes the following Findings of Fact:

1. Claimant sustained a work-related injury on May 3, 1973 from which he suffered serious and permanent facial disfigurement.

2. The nature and cause of the injury were bruised and lacerated areas above the right eye which after treatment and closure of the lacerations with seven stitches which left a residuum of a scar along the lower border of the right eye above the cheek bone approximately three-quarters of an inch long and visible for about fifteen feet caused when Claimant while attempting to dislodge a butt caught under the staging to a ships way struck the butt with a wooden maul. The maul flew back and hit the Claimant in and about the right eye.

3. Claimant earned wages of $164.30 per week based on an hourly rate of $4.12 for a forty hour week.

4. This claim is for disfigurement only and is resisted by the Defendant on the ground that this is a maritime case coming under the Longshoremen's and Harbor Worker's Compensation Act of 1972 which Defendant insists establishes the pre-eminence of the Federal Maritime Power in cases where states have otherwise valid legislative jurisdiction. In resolving this issue, the Referee relies on the decision of the Court of Appeals of Louisiana for the fourth circuit, to wit, in the case of Umbehagen v. Equitable Equipment Company, # 6946 decided on March 16, 1976 and not yet reported, but furnished to the Referee through the office of the solicitor of the U. S. Department of Labor as the position adopted by the Director of the Office of Workers Compensation Programs of the Department of Labor.

The decision holds that the Longshoremen's and Harbor Worker's Compensation Act does not preempt otherwise applicable state compensation laws under circumstances where state law provides a more favorable remedy. The above cited case was resolved on that particular issue and the Court held that both the Longshoremen's and Harbor Worker's Compensation Act and the state compensation laws can be concurrently applicable to an employment injury in the same manner as two states compensation laws can; especially in an area where there is no conflict between the two systems sufficient to compel a total divestiture of state power.

Conclusions of Law

The Referee makes the following Conclusions of Law:

1. Both Claimant and Defendant were bound by the provisions of the Pennsylvania Workmen's Compensation Act. Although the Longshoremen's and Harbor Worker's Compensation Act is also applicable in cases of this kind, it does not exclude the state from the exercise of jurisdiction in the area and under the circumstances prevailing here.

2. Claimant, having sustained serious and permanent facial disfigurement as above described, of such character and extent as to produce an unsightly appearance, such as is not usually incident to Claimant's employment, is entitled to compensation therefor under the provisions of the Pennsylvania Workmen's Compensation Act.

3. The Referee values the disfigurement as equivalent to approximately eight weeks of compensation under the provisions of the Pennsylvania Workmen's Compensation Act.

Award

Compensation is Awarded and the Defendant, Sun Shipbuilding & Dry Dock Company, hereby Ordered and

DIRECTED to pay to the Claimant, Willie Moore, compensation for permanent and unsightly facial disfigurement at the rate of $100.00 per week beginning May 13, 1973 and continuing thereafter for a period of eight weeks; together with interest at the rate of 10% per annum on all deferred amounts of compensation payable hereunder.

All, in accordance with the provisions of the Pennsylvania Workmen's Compensation Act.

APPROVAL OF ATTORNEY FEE

The Referee approves an attorney fee approximating 20% of the total award to the Claimant in the specific amount of $160.00, the same to be paid directly to Claimant's attorney, Roland Artigues, Esquire, with the balance of said Award being paid to the Claimant personally.

/s/ FRED J. TROILO
Fred J. Troilo, Referee
First District

Phila., Pa.
April 20, 1977
pm